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Right of Cotenant to Contribution From Other Cotenants for Unauthorized Repairs and Improvements Made to the Common Property

Introduction

Historically, the common law provided no remedy for a cotenant[1] who made unauthorized repairs[2] or improvements[3] to the common property of the cotenancy. This was true irrespective of the necessity of the expenditures. In the absence of any express agreement, the cotenant who made expenditures in improving or repairing the property could not compel the other cotenants to contribute their proportionate share of the cost of repairs or improvements. The apparent failure of the common law to provide relief in these situations was founded on the theory that the unauthorized acts of a cotenant which involved the common property were presumed to be solely for his personal benefit, and consequently they were done at his peril. It was contended that if the common law courts afforded a remedy, then the compulsion upon the other cotenants to meet their share of the expense might be financially ruinous and socially undesirable.[4] The courts emphasized the fiduciary relationship of cotenants, and held the conviction that to allow a right of contribution among cotenants would be a deterrent to the acquisition of property held in cotenancy.

The manifest injustice of this absolute prohibition of contribution was resolved by the courts of equity by granting relief in certain circumstances[5] where necessary to realize a just re-

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[1] Since the rules of contribution among cotenants apply equally to property held under different forms of cotenancy, the term "cotenant" is used to designate possession of an interest either as a tenant in common, a joint-tenant, a tenant by entirety, or as a coparcener.

[2] Calvert v. Aldrich, 99 Mass. 74 (1868); Freeman, Cotenancy and Partition § 261 (2d ed. 1886).

[3] Ward v. Ward's Heirs, 40 W. Va. 611, 21 S.E. 746 (1895): Freeman, *op. cit. supra* note 2, § 262.

[4] Williman v. Holmes, 27 S.C. (4 Rich. Eq.) *476 n. (2) (1850), followed in Buck v. Martin, 21 S.C. (37 S.C. Reprint) *590 (1884).

[5] 4 Pomeroy, Equity Jurisprudence, § 1240 (5th ed. 1941).

sult under the facts of the particular case.[6] Rules of recovery did not develop concurrently with the recognition of the right of contribution. Yet, the equity courts came to recognize that the ancient refinements of common law laid greater importance in fixed fiduciary theory than in economic practicalities and that this attitude was a barrier to equitable adjustments of rights among co-tenants.

I. *Contribution for Repairs*

The initial step of the courts of equity in granting relief for unauthorized repairs was to recognize that if property falls into a state of decay, or becomes less useful as a result of partial destruction, a cotenant may enter upon the property to make indispensable repairs for the preservation of the common estate. It is immaterial whether the entering cotenant first requested the consent of the other joint-owners. This right of entry to make necessary repairs necessarily entailed contribution from the cotenants for their proportionate share of the expenditures.[7] But, rather than permit a personal right of contribution from the other cotenants, equity may act in rem, and may impose lien on the property in favor of the repairing cotenant co-extensive to the sum total owed for necessary expenditures.[8] Obviously, economic practicality was the determinant of the rule. Equity based its recognition of the right to contribution upon the desirability of allowing a cotenant to preserve his interest in the common estate, and at the same time permitting contribution from the other cotenants for the incidental benefits bestowed on them.

A. *Possession — Exclusive or Non-Exclusive*

Under common law, possession by one cotenant is considered as possession by all cotenants, as some degree of unity is existent among all cotenants.[9] Each cotenant is allowed to use the common property in the same manner that he may use his own individual estate.[10] If one cotenant is to occupy the common

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6 Zonzonico v. Zonzonico, 124 N.J. Eq. 477, 2 A.2d 597 (1938) illustrates the propriety of allowing contribution for repairs made by a cotenant in occupation where an action for an accounting has been brought against him by another cotenant. Summers v. Saterfield, 120 W. Va. 1, 196 S.E. 159 (1938) indicates that a right of contribution for improvements made is not an absolute right, but dependent upon equitable grounds in the interests of all concerned.

7 Russell v. Hogan, 282 Ky. 764, 140 S.W.2d 615 (1940).

8 Mastin v. Mastin's Adm'r, 243 Ky. 830, 50 S.W.2d 77, 79 (1932).

9 Oglesby v. Hollister, 76 Cal. 136, 18 Pac. 146 (1888).

10 Morrison v. Clark, 89 Me. 103, 35 Atl. 1034 (1896) (dictum).

estate, the other cotenants may not demand the rental value of the property. The theory is that the cotenants would be suing themselves since the possession of one would be regarded as possession by all. Common law theory was to the effect that certain benefits were inherent in the property. Mere occupation of the common property by one cotenant would not defer these benefits if his possession were presumably for the benefit of all, or if at least the property remained accessible to the other cotenants so that they might enjoy the benefits of the estate.

However, the law has recognized that if the occupying tenant were to use the property in a manner contrary to the interests of the others, then an action for rental value could be maintained.[11] Adverse possession of the common property by a cotenant should rebut any notion of possession being for the benefit of all. Further, if the cotenants consent to the exclusive occupation of the property by another cotenant, the former are deprived of the benefits of the estate, as well as any right to enter the property to make repairs. To compensate cotenants for the lost benefits when one is in exclusive possession, the courts have granted the others relief in the form of a rental action when the exclusive possession was unauthorized.[12] However in either case of exclusive possession, whether authorized or unauthorized, the courts should impose a duty on the occupying cotenant to make repairs.

B. *Duty to Make Repairs*

The duty of a cotenant to make repairs and his ability to compel contribution from his other cotenants, is dependent on the extent of the benefits received through his exclusive occupation. The appropriation of these benefits arise from the nature of the property, thereby making it necessary to distinguish between income and non-income producing property. This "confiscation of benefits" doctrine is determined primarily on the basis of exclusive possession wherein one cotenant has "confiscated" the benefits of the property. This proposition has apparently caused one author to believe that some states refuse a right of contribution by failing to distinguish between income and non-income producing property.[13]

The courts agree that where cotenants have consented to the exclusive occupancy of common property by one cotenant, and he receives all profits derived from his use of the land, he is deemed to have undertaken the discharge of certain duties, including making repairs, and consequently he may not compel contribution from

[11] In re Limberg's Estate, 281 N.Y. 463, 24 N.E.2d 127 (1939). Giguere v. Hanke, 129 N.J. Eq. 7, 18 A.2d 42 (1941) expressed the opinion that there must be an ouster if a rental action is to be successfully maintained. Apparently this is the prevailing view.

[12] Cooper v. Martin, 308 Ill. 224, 139 N.E. 68 (1923)

[13] Weible, *Accountability of Cotenants*, 29 IOWA L. REV. 558, 567 (1944).

the other cotenants.[14] In effect, the occupying cotenant acts as a trustee for the common estate.[15] Where exclusive possession is authorized, the non-occupying cotenants have deprived themselves of a right to maintain a rental action against the occupying cotenant. It should follow that they are also deprived of a right of entry to make repairs. Therefore, it is only equitable that the cotenant in possession be compelled to make repairs and assume the cost for such repairs. If possession is unauthorized, the factor of exclusive possession should imply a confiscation of the benefits of the entire estate.[16] The occupying cotenant is put in a position where he is better able to undertake the burden of making necessary repairs. In either case, the anticipation of profits to be derived from the use of the land indicates that the cotenant in exclusive possession is intending to assume the cost of operating a profit-making estate.

The duty of making repairs is qualified in those situations where the cotenant is in exclusive occupation of a non-income producing estate. A common example is the situation where a cotenant may possess and occupy a home on the common property. Thus, since exclusive occupation is tantamount to a confiscation of the benefits of the property, and the occupying cotenant has confiscated the rental value of the land, he is under a duty to make repairs coextensive to the rental value received.[17] If he makes repairs in excess of the rental value, he should have the right to compel contribution for the excess. It is apparent that there is a material distinction between exclusive occupation of non-income and income producing property. Under the latter situation, the cotenant is compelled to assume the cost of all repairs because the estate is a profit making one, and the cotenant in possession elects to assume the costs of the operation of the estate in anticipation that profits will be substantial.[18] However, in the case of unauthorized possession of a non-income producing estate, the occupying cotenant may offset repairs made in the event that a rental action is brought.[19] The

14 Gordon v. McLemore, 237 Ala. 270, 186 So. 470 (1939).

15 Gearhart v. Gearhart, 213 S.W. 31 (Mo. 1919).

16 See Victoria Copper Mining Co. v. Rich, 193 Fed. 314 (6th Cir. 1911).

17 Mastbaum v. Mastbaum, 126 N.J. Eq. 366, 9 A.2d 51 (1939).

18 Gordon v. McLemore, 237 Ala. 27, 186 So. 470(1939). An election to assume the cost of repairs must be understood to mean that if the occupying cotenant uses the property for the purpose of producing economic gains, then his occupation is also indicative that he intended to assume the costs of operation, although the assumption is essentially an equitable implication.

19 In Sullivan v. Sullivan, 179 Ky. 686, 201 S.W. 24 (1918), it was stated that if a cotenant was in exclusive occupation of the land at the time repairs were made, he is not entitled to a lien on the property for the cost of repairs unless he renders an accounting for the benefits. The effect of a rental

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consequence of the rental action would be to terminate the benefits appropriated to the unauthorized cotenant. This would put the occupying cotenant in the position he would have been had his possession been non-exclusive.

Where there is a non-exclusive occupation of property, the occupying cotenant is not under a duty to make repairs, since there has been no appropriation of benefits. Yet, the factor of profits received will affect the right of contribution. If the property is non-income producing, and there is no exclusive occupation, a cotenant making necessary repairs may recover the cost of repairs.[20] However, where there is non-exclusive occupation of income producing property, it was said by a Michigan court that "It would be inequitable to allow plaintiff reimbursement for expenditures made on the property, in view of her refusal or failure to account for rents and profits derived therefrom."[21] Thus, it appears that a cotenant not in exclusive possession of an income producing estate must account for profits and assume the cost of repairs if he seeks contribution for expenditures.[22] However a right of contribution may be freely granted if the estate is not income producing, provided of course there is no exclusive occupation.

Admittedly, in distinguishing between exclusive and non-exclusive possession, as well as between income and non-income producing property, the courts have alleviated to some extent the restrictions against contribution for unauthorized repairs. However, numerous problems remain to be settled. For instance, the ability of property to produce income has been given little consideration in the courts. It is indeed an unconscionable rule that requires a cotenant to make all necessary repairs when the profits of the estate afford little relief in off-setting expenditures. Repairs that also increase the value of the estate have been almost overlooked. Yet, to solve each economic practicality would be an almost impossible task. But, rather than to be bound by an inflexible rule, the court should strive to weigh the economic considerations presented by each case, and determine contribution accordingly.

C. *Necessity of Repairs* .....

As previously stated, there was no right of contribution at law for unauthorized repairs made to common property.[23] Even though equity came to recognize a right which for so long has been dis-

action would be to compel an accounting of the benefits, thereby granting him a right of contribution for repairs.

20 Connolly v. McLeod, 217 Miss. 231, 63 So.2d 845 (1953).

21 Jarvis v. Jarvis, 288 Mich. 608, 286 N.W. 96, 97 (1939).

22 Fundaburk v. Cody, 261 Ala. 25, 72 So.2d 710 (1954).

23 Calvert v. Hldrich, 99 Mass. 74 (1868).

regarded by the common law courts, confusion centered in the use of the words "necessary repairs" in designating the standard by which the right to contribution was determined.

The courts generally construe "repair" to mean that which mends, or restores to a sound state that which has been partially destroyed or decayed.[24] To date, decisions have drawn a marked distinction between improvements and repairs. However, the necessity of a repair has been determined in some instances by judging the results of the mending process rather than by the nature of the repairing act. Hence, contribution has been denied on the grounds that the repairs were not shown to have enhanced the value of the property.[25] Yet, the majority of the courts favor a more liberal construction of the standard, requiring only that a necessary repair be for the purpose of saving the property,[26] making it habitable,[27] or preserving the common estate.[28] Repairs made merely for the purpose of providing comfort for the particular user are looked upon with disfavor.[29]

II. *Contribution for Improvements*

Where a cotenant makes expenditures for improvements, this being unauthorized by the other cotenants, the courts will generally refuse to charge the other cotenants individually for the value of the improvements.[30] Under the common law, a party who made unauthorized improvements on the common property was without a right of compensation, and any improvements became a part of the realty, title passing to the owners in common.[31] A plausible explanation for this rigidity is that it may have been thought that to permit recovery for improvements would be to permit one owner to obtain the interests of the other cotenants by adverse possession if they were unable to pay for their share of the improvements. Yet, equity was again to rescue the unauthorized cotenant.

In equity the right of contribution for improvements falls into two categories: (1) where improvements are made on common property by the cotenant in the belief that he is the only party holding an interest in the estate; and (2) where the cotenant is actu-

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24 Dougherty v. Taylor and Norton Co., 5 Ga. App. 773, 63 S.E. 928 (1909).

25 Womach v. Sandygren, 107 Wash. 80, 180 Pac. 922 (1919).

26 Brown v. Cooper, 98 Iowa 444, 67 N.W. 378 (1896) (dictum).

27 Mastin v. Mastin's Adm'r, 243 Ky. 830, 50 S.W.2d 77 (1932) (dictum).

28 Israel v. Israel, 30 Md. 120 (1868) (dictum).

29 Israel v. Israel, *supra* note 28.

30 Leake v. Hayes, 13 Wash. 213, 43 Pac. 48 (1895).

31 Ward v. Ives, 91 Conn. 12, 98 Atl. 337 (1916).

ally aware of his limited interest in the estate. Under the first classification, it is assumed that the improvements were made in good faith. Otherwise, there is no right of contribution.[32] Where improvements are made in good faith under the mistaken belief that the cotenant is the sole owner of the estate, his contribution is ordinarily limited to the value of the improvements to the estate, rather than the actual cost of the expenditures.[33] If, however, the other cotenants were aware that the acting cotenant was making expenditures in the belief that he was the sole owner of the property, the same degree of good faith on the part of the actor is not required.[34] Where improvements are made under a claim of title, the value of the improvements may be recovered only in the event of a sale of land, or upon an eventual partition.[35] The time element may prove to be disastrous, for the improvements as well as the land may be consumed by natural deterioration while the improving cotenant waits for an eventual sale or partition.

In many states, "betterment acts" have been enacted allowing compensation for the cost of improvements made to property to which the improver does not have complete title.[36] These acts provide relief only for an occupant of land who has color of title and who makes improvements in good faith and subsequently it is found that he is not the sole rightful owner. Under these circumstances the rightful owner of the estate is precluded from bringing an action in ejectment until he has compensated the party making the improvements. However, as already stated, due to the fact that a cotenant who has made improvements under claim of title could obtain relief upon partition or sale of the property, it has been held that the statutes have no application to cotenancies.[37] In other instances the "betterment acts" have been extended to cotenants, who make improvements under claim of title.[38] The latter interpertation could serve to alleviate the hardship arising in the situation where a cotenant disposes of his interest to a party who is unaware of improvements made on the common property. A party making a purchase under the good faith belief that the property was free from incumbrances is not liable to the improving cotenant upon

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32 Buck v. Martin, 21 S.C. (37 S.C. Reprint)* 590 (1884).

33 Buck v. Martin, *supra* note 32 upholds the right of the improver to recover the enhanced value of the property. Accord, Dean v. O'Meara, 47 Ill. 120 (1868); Sarbach v. Newell, 30 Kan. 102, 1 Pac. 30 (1883).

34 Crest v. Jack, 3 Watts 238 (Pa. 1834).

35 Hall v. Boatwright, 58 S.C. 544, 36 S.E. 1001 (1900).

36 See, *e.g.* ARK. STAT. ANN. § 34-1423 (1947); IND. ANN. STAT. § 3-1501 (Burns 1946); S.C. CODE ANN. § 57-401 (1952).

37 Hall v. Boatwright, *supra* note 35.

38 Shepherd v. Jernigan, 51 Ark. 275, 10 S.W. 765 (1889).

partition.[39] Yet, the "betterment act" should allow the improving contenant to proceed personally against the cotenant selling his interest in the estate provided the good faith requirement of the act is met.

The second classification of cases involving the right of contribution for unauthorized improvements is comprised of those instances in which a cotenant knowing his limited interest in the common property makes improvements for the betterment of the estate. The fact that improvements are made does not, by itself, create a right of contribution as to the improving cotenant. It must be generally shown that the improvements are in the form of restoration of the property, or made for a purpose that is normal in regard to the use and character of the property,[40] as well as adding to the value of the estate.[41] It is obvious that if improvements are made indiscriminately, without design or purpose, no right of contribution will be granted upon partition. Thus, if improvements are unnecessary for the use of the estate, fanciful, highly expensive, or ornamental, and made with intent of having the land partitioned, relief will be denied.[42] Moreover since contribution lies in the discretion of equity, it will be denied if injustice would result to the other cotenants.[43] Since the improver in this situation does not act in reliance on color of title to the whole estate, the "betterment acts" would not be applicable.

Conclusion

The present law governing the right of contribution for repairs and improvements is in a somewhat chaotic state. Items of repairs and improvements are economically relatively unimportant in the majority of suits in which the problem arises. Hence, the lack of interest displayed by the legal profession has contributed to the needless confusion of this problem. Yet, much confusion has been generated by the courts' persistent reluctance to clarify the circumstances under which contribution may be granted. According to the law of cotenancy, it is recognized that cotenants are obliged to bear their share of the cost of necessary repairs and improvements made to the common property. They should not, on the other hand, be subject to a multitude of burdens imposed by unauthorized repairs and improvements made by one of them to the common property. Experience has demonstrated that these

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39 See Summers v. Satterfield, 120 W. Va. 1, 196 S.E. 159, 162 (1938).

40 Ford v. Knapp, 102 N.Y. 135, 6 N.E. 283 (1886).

41 Hunt v. Harris, 149 Ga. 225, 99 S.E. 884 (1919).

42 Whitledge v. Waite, 2 Sneed 335 (Ky. 1804) (dictum).

43 Summers v. Satterfield, 120 W.Va.1, 196 S.E. 159, 162 (1938).

propositions are not capable of being set forth in a syllogistic form. Practical economic considerations and distinctions must be sought rather than relying upon logical necessities. The approach must necessarily be a case by case method to be determined upon the many and varied factual situations.

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